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Tolman v. Logan City and Does : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THOMAS W. TOLMAN and VERLA F. TOLMAN,
Appellants

Appellate Case No. 20060713-CA

vs.

LOGAN CITY and JOHN and JANE DOES, 1-20,
Appellees

BRIEF OF APPELLANTS

Appeal from the First District Court, Cache County, Judge Low

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BRIEF OF APPELLANTS

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Section 78-2a-3(2)(j), Utah Code.

STATEMENT OF THE ISSUE PRESENTED FOR APPEAL

Did the trial court err in granting a summary judgment, dismissing the complaint filed by Appellants ("Tolmans")?

> Summary judgment is appropriate only when there are no genuine issues of fact and the moving party is entitled to judgment as a matter of law. See Utah R. Civ. P. 56(c). In reviewing a grant of summary judgment, we do not defer to the legal conclusions of the district court, but review them for correctness. When reviewing a municipality's land use decision, our review is limited to determining "whether . . . the decision is arbitrary, capricious, or illegal."

Springville Citizens for a Better Cmty. v. City of Springville, 1999 UT 25, ¶22, 979 P.2d 332 (Utah 1999). This issue was preserved in the trial court in Tolmans' memorandum opposing motion for summary judgment. R. 199-216.

STATEMENT OF DETERMINATIVE LAW

Fourteenth Amendment to the Constitution of the United States of America,

Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article I, Section 7 of the Constitution of the State of Utah:

> No person shall be deprived of life, liberty or property without due process of law.

Article I, Section 22 of the Constitution of the State of Utah:

> Private property shall not be taken or damaged for public use without just compensation.

Section 10-9a-801(3), Utah Code:

> (a) The Courts shall:
> (i) presume that a decision, ordinance, or regulation made under the authority of this chapter is valid; and
> (ii) determine only whether or not the decision, ordinance, or regulation is arbitrary, capricious, or illegal.
> (b) A decision, ordinance, or regulation involving the exercise of legislative discretion is valid if the decision, ordinance, or regulation is reasonably debatable and not illegal.
> (c) A final decision of a land use authority or an appeal authority is valid if the decision is supported by substantial evidence in the record and is not arbitrary, capricious, or illegal.
> (d) A determination of illegality requires a determination that the decision, ordinance, or regulation violates a law, statute, or ordinance in effect at the time the decision was made or the ordinance or regulation adopted.

Section 10-9a-405, Utah Code

> Except as provided in Section 10-9a-406, the general plan is an advisory guide for land use decisions, the impact of which shall be determined by ordinance.

STATEMENT OF THE CASE

Tolmans' suit is a challenge to Logan City's denial of a rezone request that Tolmans allege would allow use of their property consistent with surrounding properties. It is an action for review of a Logan City Council land use decision denying their application to rezone their single family home-lot, and 31 others the City advised and directed them to include, from a single-family zone up to a multi-family zone. When they purchased their home it was then and has ever since been surrounded by multi-family homes. This multi-family zone was established by a master plan, zoning ordinance and map adopted in 1950. By an unconstitutional

amendment that violated the plan, the area was down-zoned to single family in 1989 by an unconstitutional ordinance; it was then confirmed by a *defective revised plan* in 1995, implemented by an expanded defective amended ordinance in 1996. Similar conditions exist in the other lots included in the rezone. This University neighborhood has been in predominantly multi-family uses since and before zoning. Under the U.S. Supreme Court doctrine of "reverse spot zoning" the denial of the rezone was arbitrary, capricious, illegal and denied substantive due process and equal protection. Tolman's also make claims for damages for regulatory takings, and against unnamed officials who may have acted in objective bad faith in the enactment or enforcement of the unconstitutional amendments. R. 20-26. Based on the record developed in the summary judgment proceedings Tolmans claim that all the down-zoning amendment "schemes" of 1989, 1995 and 1996 are unconstitutional, and void as a matter of law.

The City moved for summary judgment against Tolmans on their second amended complaint. R. 146-148. The City supported the motion with a memorandum (R. 33-49) and exhibits A-K consisting entirely of City public records. R. 50-145. Absent from the extensive records supplied by the City, is the original 1950 zoning plan-ordinance which Tolmans included as their Exhibit "C."

Tolmans filed a memorandum opposing the City's motion for summary judgment R. 199-216. The affidavit of Tolman is attached. R. 158-66. The affidavit verified the Second Amended Complaint (R.158 ¶ 1) and incorporated; Ex. "A", the signatures of owners of other lots and supporters of the expanded

rezone application (R-167-63, R. 159-60, ¶ 3-5); Ex. "B", maps (R. 174-79); and, Ex. "C", the original comprehensive plan-zoning ordinance of 1950 dedicating this area for multi-family dwellings. R. 180-97.

The City filed a reply memorandum with no attachments, affidavits or exhibits. R. 218-25.

The District Court entered a Memorandum Decision in which it granted the City's motion "[f]or reasons stated by the Defendant in it's original Memorandum, and more specifically, in it's Reply Memorandum." R. 229-30. The Court then entered a Summary Judgment and Order of Dismissal, incorporating the reasons given in the City's memorandums without any other rationale. R. 233-34.

STATEMENT OF FACTS

Tolmans purchased their older single-family home in 1983. It was located in a zone which had been multi-family from the beginning of zoning in 1950. That 1950 zoning ordinance was also the comprehensive plan. R. 21, ¶5. Tolmans raised their nine children in the home until they purchased and moved into another home in 2002. They attempted without success to sell their home for a reasonable price because the City in 1989 had granted a zoning amendment down-zoning the area to a single family zone. R, 22 ¶9. Tolmans' home was completely surrounded by multi-family dwellings. In 1995 the City incorporated the 1989 downzoning into an amended comprehensive plan and its 1996 ordinance and map based on the *pretext* that it would *restore single-family character, where there had never been single family character.* R.38. In the broader neighborhood multi-family uses

overwhelmingly predominated. In the four-block area in which their lot centered, 63%, or 89 of the 142 residential structures were multi-family. In the expanded-rezone requested area, 74% or 23 of the 31 dwellings are multi-family. During the resulting three months delay caused by the City's insistence on expanding to a multi-lot rezone, Tolman was able to get the owners of all 31 adjacent lots to join in the petition. Of the 8 single family lots in the rezone area, 3 including Tolmans' are totally surrounded by multi-family, 3 adjacent single-family lots owned by one owner are totally surrounded and the other 2 adjacent single-family lots are also totally surrounded by multi-family uses. The multi-family dwellings in the rezone area are severely limited by their non-conforming use status. R.162-65 & 175-79.

Not only does the City fail to deny that Tolmans' home is totally surrounded by multi-family structures in this neighborhood and rezone area where multi-family uses overwhelmingly predominate, the Planning Department, Planning Commission and City Council, affirmatively admit that multi-family uses are the "best uses" and therefore predominate in this area as follows: (emphasis supplied)

> 18. The City's Planning staff prepared an evaluation of the Tolman application on July 14, 2004. The staff recognized that multi-family use is likely the best use in the area and that preliminary results of the general plan revision process would probably *support the rezoning*. (Staff Report, July 14, 2004, copy enclosed as Exhibit H.)" R.38 City Statement of Facts.
>
> The area of the proposed rezone is dominated by existing multi-family dwellings and is surrounded by a mixture of single family homes and multifamily properties". R. 107, Staff Report.

Community Development Director Jay L. Nielson reviewed a rezone request that had been denied by the Planning Commission to rezone 32 properties from single family to Multi-Family High. He explained that 600 East was the current dividing line for high density. The request was made because more than 60% [74% actual supra] of the properties in the area were currently multi-family, and the likelihood of the area being *restored to single family* [pretext for downzoning] was in Mr. Nielson's words ***"extremely remote"*** [virtually impossible without demolition of 39 years of multi-family development]. Mr. Nielson said the consensus [whose?] of the "Plan for Growth Challenge" was that the *fringes* [arbitrary piece-mealing] of 400 North should be higher than it currently is, but final conclusions have not had *any type of public scrutiny yet* [mandate for judicial rezone]. R. 139, Council pre-hearing.

18. The staff recognized that *multi-family use is likely the best use in the area* and that the preliminary results of the general plan revision process [political] process [still not started] *would probably support the rezoning*...[after Tolmans' bankruptcy or death if ever].

19. The staff believed the rezoning request was *premature, implying that it might be better under the revised general plan ."* [reason why judicial v. political rezone imperative].

20. The staff also recognized the requirement that the rezoning be consistent with the [revised] general and that the *rezoning might constitute illegal spot zoning* [in law denial of rezone is illegal "reverse spot zoning"].

21. The staff recommended denial of the request because it was incompatible with the [***revised]*** General Plan objective ***'to restore the single family scale, character, and stability to the area*** [repeats the same erroneous pretext for plan-contra downzoning]." R.38, City Facts.

The City's justification for the down-zoning of 1989 and; downzoning's confirmation in the current amended 1995 Plan revision; and the second amended and expanded 1996 zoning ordinance; has been always and repeatedly based on the disingenuous premise: That it would "*restore the single family scale, character, and stability of the area" (supra),* and that these *"were basically established single family neighborhoods*": (emphasis supplied)

> The actions sought, called *downzoning* requests, were intended to stop proliferation of *fourplex* residential development **in what were basically established single family neighborhoods."** R. 36, ¶ 12.

The falsehood involved in the City's pretense that these were ever *"basically established single family neighborhoods"* is further illustrated by the location of Tolmans' home on 400 North Street, which bisects the neighborhood. Fourth North, which is U.S. Highway 89, is and always has been a major thoroughfare ever since Utah State Agricultural College ("USU") was established in the late 1800's. It is the direct opposite of a typical quiet single family neighborhood for families with children. From Tolman's affidavit:

> 7 . . . Our home and lot at [5]25 East Fourth North, fronts on a four lane highway and principal traffic artery designated on the Plats as 'Fourth North Street' [R. 175-179]. It has turning lanes with parallel parking on both sides and a speed limit of 40 miles per hour. It is one of the principal traffic arteries in the valley and points east. It [is] also US Highway 89, and designated by Logan City as "University Boulevard". It is also the main arterial highway connecting downtown Logan, five blocks to the west of our home, to Utah State University, less than two blocks East of our home. It has always been the main entry to and through the University campus. The eastern extension of US 89 beyond campus is the highway through Logan Canyon and continues on to Yellowstone Park. It connects with other highways going to points easterly from Cache Valley. The block East of our Block 14 borders on the west of the Campus and has always been zoned for multiple dwelling housing. The four blocks included in Exhibit B [R. 175-179] has always been the prime location for University student, staff, and personnel housing in predominantly multi-dwelling housing as described in Exhibit B and City Exhibit H.
>
> 8 . . . I was raised in my family home at 393 East 4th North Street until 1970. For 13 years thereafter I was in the Military, school and work, living away from Logan but frequently visiting my family and friends who lived in this neighborhood. My ancestors have lived in this neighborhood since about 1916. I moved back into the neighborhood in a rented home for one year and purchased the subject home in 1983 where we lived and raised our nine children....I thus have intimate knowledge of this neighborhood."

R. 161-62.

Tolmans have never taken any action in reliance on or in support of the down-zoning ordinance of 1989 or the confirming 1996 ordinance:

> 2. Neither me nor my wife have ever taken any action in reliance on the Logan City rezoning ordinances of 1989 or 1996, which down-zoned the property on which our subject home is located, from multi-family to a single family dwelling zone. When we purchased the home in 1983 we relied on the Zoning Ordinance 1950 then in effect, which established the multi-family zoning and the predominant multi-family uses in that zone that assured us that we would be able to sell the home for a reasonable price surrounded by multiple dwellings.

R. 159.

SUMMARY OF ARGUMENTS

The summary judgment dismissing the complaint [R. 233-34] contradicts the law applied to the uncontradicted facts established in Tolman's affidavit and exhibits (R. 158-198, 20-26 verified complaint) which the City failed to put at issue with either affidavits or counter affidavits in their summary judgment pleadings. The City's records also strongly support Tolman's affidavit.

In this case, Tolman's unchallenged affidavit and the City's records establish the facts leading to the conclusion that the whole three-stage downzoning "Scheme" is unconstitutional. This renders the 1989, 1995 and 1996 amendments to the 1950 plan-ordinance null and void. For brevity this Scheme is hereafter referred to as the "D-Z Scheme"or "Scheme."

Alternatively, as "reverse spot zoning" is applied to Tolmans, and the other petitioners, by denying Tolmans' rezone of their single family dwelling and lot

from a single family zone to a multi family zone where it is surrounded by multi family uses, the City has denied equal protection and substantive due process in violation of the Fourteenth Amendment to the Constitution. The Supreme Court, in *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978) distinguished legitimate zoning from the type of "reverse spot" zoning involved in this case, which denies equal protection and due process:

> [L]andmark laws are not like discriminatory or 'reverse spot' zoning ; that is, a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones

Id, at 132.

Based on the same reasons and Tolman's unchallenged affidavit facts, the "takings" claims have been established, or at least adequately alleged.

This rezone denial was a non-debatable determination by the City Council, acting as a land-use authority with no discretion to do other than rezone the "island" lots to allow their uses consistent with the predominating surrounding uses.

There was ample evidence in the record that the City's refusal to rezone Tolmans' property amounted to a confiscatory, discriminatory, arbitrary, capricious, and illegal reverse spot zone. There is ample evidence in the record that the 1989 amendments and general downzones that followed were unconstitutional in all of the same respects. This case should be allowed to go to trial so that Tolmans and other islanders within the multi-family sea in the shadow

of Old Main Hill may use their property as the 1950 master plan and ordinance allowed and as the neighborhood has existed.

ARGUMENT

I. TOLMANS ARE VICTIMS OF REVERSE SPOT ZONING

In *Penn Central,* 438 U.S. at 142 *infra*, the Supreme Court adopts the illegal "reverse spot" zoning doctrine applicable here. It also provides a threshold question of the use in cases of various synonyms for denials of equal protection and substantive due process under the Fourteenth Amendment and "takings" under the Fifth Amendment. The meaning of terms is a key to understanding the application of a variety of different terms used in cases and authorities that signify the same constitutional violations. *Penn Central* is an example where "discriminatory" equates to an equal protection denial and "arbitrary" refers to a substantive due process denial.

Many synonyms are employed in cases, statutes etc. that equate to denial of [substantive] "due process", equal protection; and to "takings", all at issue here. Substantive due process denial equates to actions that are "arbitrary," "capacious," "irrational," "unreasonable," and "fail to advance the legitimate government interest." Unconstitutional takings are called "confiscatory," "serious injury or loss," and "not economically viable." Denials of equal protection equate to; "invidious," "class," and "irrational" "*discrimination.*" See 83 Am Jur 2d Zoning and Planning, §§ 35-39.

The *Penn Central* "reverse spot" zoning holding affirmed a decision of the Court of Appeals of New York in *Penn Central Transp. Co.. v. City New York City.* 366 N.E.2d 1271, 42 N.Y.2d 324, (1977) which provides a more detailed rational for the doctrine:

> To this extent, such [landmark] restrictions resemble "discriminatory" zoning restrictions, properly condemned, affecting properties singled out in a zoning district for more restrictive or more liberal zoning limitations (see *Udell v. Haas,* 21 N.Y.2d 463, 476-478). There is however a significant difference. Discriminatory zoning is condemned because there is no acceptable reason for singling out one particular parcel for different and less favorable treatment.

Id, at 1274-75

In *Udell v. Haas,* 235 N.E.2d 897, 21 N.Y.2d 463, 476-477 (1968) the court held that there was discriminatory "reverse spot" zoning in the same context as here, where the surrounding less restrictive uses resulted from non-conforming uses commenced before down-zoning. This case relates to the whole D-Z Scheme as well as the single and multiple lot rezone levels.

> Discrimination in zoning is usually thought of in terms of the injustice done to the landowner. In reality it is also a wrong done to the community's land use control scheme. It is the opposite side of the coin, one side of which is "spot zoning." Nevertheless, a claim of discrimination is not just another way of saying that the change does not accord with the comprehensive plan. When the claim is one of discrimination, the focus of inquiry is narrower. The issue is the propriety of the treatment of the subject parcel as compared to neighboring properties.
>
> . . . The court pointed out that, while those properties would of course be entitled to an exemption for existing nonconforming uses, there was nothing to differentiate that parcel from [a neighboring parcel]
>
> ....A property owner need not prove confiscation to establish discrimination. In almost every respect the properties are alike.

Id, at 476-78.

Three reported Utah cases have accepted, defined and distinguished the applicable principle of illegal "reverse spot zoning." Using "island" terminology, these cases hold that spot zoning results in two types of "islands." They recognize that the type in this case is illegal and results when the zoning authority *limits* the uses which can be made of a small parcel located in the center of a *less restricted* use area. The other type of spot zoned island is *legal* and results when most of a *large* district is devoted to a *restricted* use, but additional *less restrictive* uses are permitted in one or more spots in the district. Examples of *legal* spot zoning are residential area grocery-convenience stores etc. None of the four Utah decisions found illegal spot zoning in the facts because either the area was too large to be considered an "island," or it was next to a different zone, or because the "island" in question enjoyed fewer restrictions than those on the surrounding properties. *See Marshall v. Salt Lake City*, 105 Utah 111, 141 P.2d 704, 149 A.L.R. 282, (1943). *Crestview-Holliday Homeowners Ass'n v. Engh Floral Co.*, 545 P.2d 1150 (Utah 1976). *Town of Alta v. Ben Hame Corp.*, 836 P.2d 797 (Utah Ct. App. 1992). In the unpublished decision of *Donner Crest Condominium Homeowners' Ass'n v. Salt Lake City*, 2005 WL 775306 (Utah App. 2005), this Court follows the *Marshall* line of cases and cites *Determination Whether Zoning or Rezoning of Particular Parcel Constitutes Illegal Spot Zoning*, 73 A.L.R. 5th 223 as a help in drawing the legal-illegal spot-zone line.

This case is the first Utah appeal where, by these definitions, the facts establish *illegal* reverse spot zoning resulting from the City's denial of Tolmans' rezone petition.

In *Marshall,* unlike this case, the "spot zones" were less restrictive "spots" for securing family conveniences and necessities. These "spot zones" were surrounded by more *restrictive* zones for residential uses. The Supreme Court distinguished this type of zoning from "reverse spot" zoning as follows:

> The cases relative to "spot zoning" are generally cases where a particular small tract, within a large district was specially zoned *so as to impose upon it restrictions* not imposed on surrounding lands.

Marshall, 141 P.2d at 711 (emphasis supplied). In *Crestview* the Utah Supreme Court held that reverse "spot zoning" did not apply because of the large size of the tract. The Court distinguishes between *legal and illegal* "spot zoning" in the context of two types of "islands" as follows:

> Spot zoning results in the creation of two types of "islands." One type results when the zoning authority improperly limits the use which may be made of a small parcel located in the center of an unrestricted area. The second type of "island" results when most of a large district is devoted to a limited or restricted use, but additional uses are permitted in one or more spots in the district.

Crestview 545 P.2d at 1151. This Court in the *Ben Hame* decision cited *Crestview* in discussing the term "spot zoning.". *Ben Hame*, 836 P.2d at fn 6.

The law related to illegal "spot zones" and "reverse" spot zoning has been fleshed out in reported cases in other states. Many of these deal with fact patterns similar to the ones at bar. In *Ross v. City of Yorba Linda*, 1 Cal App. 4th 954, 2

Cal.Rep.2d 638 (Cal.App.Dist.4 1991) the Rosses owned an acre-plus lot in Yorba Linda. The property was zoned to allow only one dwelling per acre. If it had been rezoned to conform to the category to which *most but not all* of the surrounding lots conformed, they could have built another house on the property. 1 Cal.App.4th at 957. The Yorba Linda city council down the Rosses' rezone request.

> While every intendment favors the constitutionality of local land use restrictions, they cannot be arbitrary and discriminatory. A blatant example of discriminatory land use legislation is "spot zoning." Spot zoning is "[w]here a small parcel is restricted and given less rights than the surrounding Property . . ." As the Court said in *Reynolds v. Barrett* . . . "It is obvious that by a zoning ordinance a city cannot unfairly discriminate against a particular parcel of land.
>
> . . .
>
> Here . . . a . . . restriction prevents a landowner from developing property consistent with the surrounding area. The character of the area is already suburban rather than rural; and, as the trial judge noted, the city would only be fooling itself to pretend otherwise

Ross, 1 Cal.App.4th at 959-60, 961 (quoting *Reynolds v. Barrett*, 12 Cal.2d 244, 251, 83 P.2d 29 (1938)).

Disengeneous pretexts have been the name of the game in Logan zoning since the arbitrary and capricious down-zoning of 1989. Here, the City planners no longer "pretend." They openly admit that multi family dwellings have been predominant in the neighborhood.

The court in Ross goes on to debunk Yorba Linda's attempts to paint the autumn leaves green.

> . . . The only basis advanced, however, is the prevention of "encroaching urbanization." This point fails because the prevention of

> "urbanization" ("suburbanization" would be more accurate) cannot be a rational basis where "urbanization" has already taken place. If a vacant acre is surrounded by high rises it would be absurd to claim that acre should be treated differently from surrounding property to prevent "urbanization." Whatever other reasons might justify a different classification (e.g., a need for park space), one could not claim development of the acre would change the character of the area.
>
> The city's second attempt to distinguish *Hamer* is to put forth the "domino theory" of creeping "zoning concessions." The city argues that if it is forced to allow the Rosses to build on their land consistent with the surrounding lots, other landowners will invariably use the Rosses' case as precedent in seeking their own zoning changes.
>
> . . .
>
> . . .[T]he dark implication in the city's argument is that there are numerous "islands" in the city's zoning scheme, and that the "line must be drawn" at this one, lest others fall prey to "urbanization." Be that as it may, arbitrary line-drawing is antithetical to the individual right to equal protection of the law. The city appears to be afraid it will be forced to treat other landowners in a nondiscriminatory manner if it treats the Rosses in a nondiscriminatory manner. This is not an idea with much persuasive force.

Ross at 962.

The case before this Court is a more complete and ultimate case of "reverse spot" zoning than the one in *Ross.* Two of the lots bordering on the *Ross* lots were of about the same one acre size as theirs. The less restricted half acre lots were also contiguous. Thus theirs is called "virtually" surrounded. *Ross* at 958. Tolmans' lot is "totally" surrounded by multi-family uses, including the lot directly across the main arterial highway.

Other cases do add to a broader perspective of different terminology used by courts to describe the equal protection, substantive due process and "takings" implications of "reverse spot" zoning.

A review of Florida iterations of "reverse spot zone" law doctrine is found in *City Comm'n of City of Miami v. Woodlawn Park Cemetery Co.*, 553 So. 2d. 1227 (Fla 3d DCA 3d 1989). The 68-acre cemetery, was zoned *residential.* By the time of the rezone attempt, the main highway frontage, except for the Cemetery, had been rezoned *commercial* and fully developed. Its long back bordered on residential development. The rezone request was for the portion along the highway.

> The Florida Supreme Court...stated: "The block in which appellant's property lies is a 'veritable island' to borrow a term from appellants brief."

Id, 1227 So.2d at 1231 (quoting from *Tollius v. City of Miami*, 96 So.2d 122 (Fla. 1957)).

> There must be a substantial and reasonable relationship between the need for zoning restrictions and the public health, morals, safety or welfare to justify interference, by exercise of the police power, with an owner's right to the enjoyment of his property. Only in the presence of such necessity will he be required to make a personal sacrifice for the good of the people.

Id, at 1231 (citation omitted).

> "Where changed conditions create a situation where the zoning of appellants' property is so unreasonable as to constitute a taking of his property, then the courts are justified in striking down the arbitrary zoning classification....We hold that the zoning of appellants' property is arbitrary and unreasonable and amounts to confiscatory regulation . . ."

Id, at 1232 (quoting *Kugel v. City of Miami Beach,* 206 So.2d 282 (Fla. 3DCA), *cert. denied*, 212 So.2d 877 (Fla. 1968), *cert. denied*, 393 U.S. 1021, (1969)).

> "The property is then, except for the northernmost part, similar to the 'veritable island' with which the Supreme Court of Florida was faced in *Tollius v. City of Miami.* . . The rationale applied in Kugel, Supra, appears

to be appropriate here. To deny the relief sought herein, as in Kugel, would constitute spot zoning in reverse."

Id, at 1232 (quoting *Manilow v. City of Miami Beach,* 213 So.2d 805 (Fla. 3d DCA 1968), *cert. discharged*, 226 So.2d 805 (Fla. 1969), cert. denied, 397 U.S. 972 (1970)).

> Running through all of these cases is the court's determination that it is entirely arbitrary and not at all "fairly debatable" on grounds that make sense . . . to deny the subject property owner equal treatment, although similarly situated. It is thought to be confiscatory of a person's property in such cases to prevent a property owner from utilizing his property in a certain way, when virtually all of his adjoining neighbors are not subject to such a restriction. Often, as previously noted, courts refer to such arbitrary refusals to rezone as "reverse spot zoning" because the refusal to rezone the subject property creates, in effect, a veritable zoning island . . . or a zoning peninsula . . . {A] governing authority, although having large discretionary zoning power, may not, under the guise of its police power, discriminate in such a blatant fashion against a property owner - - such arbitrary governmental action violates the owner's constitutional right to make legitimate use of his land.

Id at 1233.

In the *Woodlawn* case, the City claimed it was acting within its legislative discretion in denying the rezone request. The court rejected the notion use of the city's police power was "debatably" appropriate because the neighborhood had already changed. In dispensing with the City's claim of legislative discretion to deny the rezone, the Court again quoted the *Kugel* opinion as follows:

> "Appellee also suggests that this Court should treat the residential zoning of appellants' property as an exercise of the legislative authority of the city council, and that as such, it falls under the fairly debatable rule adhered to by this Court . . . The present case does not come within the bounds of this rule because the record clearly reveals that to change the residential zoning of appellant's property will in no way act to destroy the integrity of a neighborhood. The character of the property...has already

been changed by other actions of the municipality. The zoning regulation in question, as applied to appellants' property, is arbitrary and unreasonable and cannot be characterized as 'fairly debatable.' "

Woodlawn, 553 So.2d at 1235-36 (quoting *Kugel*, 206 So.2d at 285).

The chief difference between Tolmans' case and *Dufau v. Parrish of Jefferson,* 200 So.2d 335 (La.App. 4 Cir. 1967) is that the down-zoning there was from commercial to residential rather than from multi-family to single-family. The downzoned residential lots in *Dufau* were totally surrounded by commercial structures.

> ". . . The court [in *Reynolds v. Barrett*, 12 Cal.2d 244, 83 P.2d 29 (1938)] stated that a city could not, by a zoning ordinance, unfairly discriminate against a particular parcel of land; that even if the general scheme of zoning was sound and valid, nevertheless the court could properly inquire as to whether the *scheme* of classification and districting had been applied fairly and impartially in each instance; and that obviously a city purporting to act under its police power could not create a business district, and entirely within it create an 'island' of one lot restricted to residential purposes, when no rational reason existed for such a classification." [quoting from *State ex rel. Dema Realty Co. v. McDonald*, 168 La. 172, 121 So. 613]
>
> Applying the above test, the conclusion is inescapable that Appellees' property is surrounded by commercial activity and, under the circumstances, their property would be completely valueless as residential property and would, in fact, be practically unsalable. After the ...Council in 1960 amended the original zoning ordinance and made the Square Commercial, it should have taken into consideration whether or not the property was, in fact, being utilized for commercial purposes, or whether there was such a change in the development in the Square that the original reclassification to Commercial in 1960 was erroneous before proceeding with the 1966 reclassification.
>
> The jurisprudential guidelines for zoning and zoning reclassification may be summarized as:

1. A homeowner has the right to rely on the rule of law that a classification made by ordinance will not be changed unless the change is for the public good.

2. The power to amend is not arbitrary, it cannot be exercised merely because certain individuals want it done or think it ought to be done.

3. Before a zoning board rezones property, there should be proof either that there was some mistake in the original zoning or that the character of the neighborhood has changed to such an extent that the reclassification ought to be made.

4. The burden of proof of original mistake or the need for a substantial change is upon the proponents of the change."

Id. Following this four-step guide: (1) Tolmans could rely on the rule that the 1950 multifamily classification would not be changed unless the change was for the public good; (2) Logan City's power to make changes (1989, 1995, and 1996) is not arbitrary, and cannot be exercised merely because certain individuals think they can turn back time to the 1870s and undo all the apartment-building and house conversions that have been going on for over a century; (3) Before Logan City passed any of the amendments there should have been proof either that there was some mistake in the 1950 zoning scheme, or that the character of the neighborhood had actually changed to single-family to such an extent that the zoning classification also needed to be changed to match; and (4) Logan City has the burden to show that the mistake was made in 1950 or that the neighborhood character actually changed to single-family before the 1989 amendment. Any other rationalization for Logan's downzoning wipes out property rights.

The Supreme Court of Illinois, in *Trust Co. of Chicago v. Chicago* 96 N.E. 2d 499 (Ill. 1951) discussed the constitutional limits of downzoning in the context of a Chicago amendatory downzone.

> . . . [W]here the amendment of a zoning ordinance is clearly arbitrary and unreasonable action on the part of the city council, ostensibly taken to promote the public health, safety, comfort, morals or welfare, but having no substantial relation to any of those objects, such amendment is of no force or effect. This results not because the city may not repeal or amend the existing ordinance, but because in enacting the new legislation, as in enacting the original, it must stay within constitutional limitations, which exclude arbitrary and unreasonable action as lacking due process of law and forbid the confiscation of private property when necessary to preserve or promote the public welfare.
>
> . . .
>
> It is clear from the record in this case that there is no actual or reasonable connection between the rezoning of plaintiffs' property from apartments to single-family residence and the public health, safety, comfort, morals or welfare. It is also clear from the undisputed testimony contained in the record that the erection of a multistoried apartment building on plaintiff's property would in no way injure or detract from the general welfare of the city or the general welfare of the community wherein the property is situated or from the general welfare of any community or neighborhood adjacent to said property, when the city or any such community is considered as a whole; and it is as a whole that a municipality or a community must be considered when zoning laws and ordinances are involved.

Trust Co. of Chicago, 96 N.E.2d at 502, 504.

The Utah Supreme Court, in *Wilson v. Manning* 657 P.2d 251 (Utah 1982), in rejecting referendum as a remedy against zoning changes confirmed that landowners such as Tolman have other remedies available to vindicate their property rights:

> Nor does this decision leave those who oppose zoning changes . . . without a remedy apart from the political one . . . County and city zoning ordinances can be set aside in courts if they are confiscatory, discriminatory, arbitrary, capricious, or otherwise without basis in reason. One way to make that showing . . .is to demonstrate that the amendment runs counter to the terms of or the policy established in the underlying law or ordinance or the zoning master plan.

Id, 657 P.2d at 254 (citations omitted).

In this case, the D-Z Scheme directly "countered" the "terms of the policy established in the underlying" 1950 plan-ordinance which was also the "zoning master plan." The injury to citizens' property rights is multiplied by the fact that in 1950 this traditional University neighborhood community was already substantially multi-family in character, and by 1989 had become overwhelmingly so in harmony with the policy established in the 1950 plan-ordinance.

It is well within the scope of the complaint for Tolman's to prove that within the City, the political decision-makers have yielded to the special interests of a few vocal single-family advocates and not to the broader public good as exercise of the police power requires. The present City planners have affirmatively admitted the reality of overwhelming multi-family neighborhood characteristics, but appear unable to understand or implement the legal consequences that flow from those facts, as readily shown by the City's own submissions to the record. The political and administrative roadblocks have and will continue to stifle constitutional correction within the city, unless judicial action protects the property rights of those who would use their property.

II. TOLMANS' CLAIMS ARE STILL VIABLE

The City defends its position in part on the ground that it is too late for Tolmans or anyone else to question the validity of the 1989, 1995, or 1996 amendments. It is not too late, however, for anyone adversely affected to challenge the constitutionality of a confiscatory, discriminatory, and irrational amendment. Mere acquiescence is not a bar. Tolmans have not waived their constitutional rights.

> A purchaser of property has the right to rely upon the classification which existed as to that property when the purchase was made and upon the rule of law that its classification will not be changed so long as the basis of public welfare remains the same. This does not mean however, that a purchaser of property upon which a restriction had previously been imposed by a zoning ordinance may not attack the validity of such restriction. Neither such purchase nor the fact that the purchaser or his grantor may have acquiesced in such classification will estop the purchaser from testing the validity of the ordinance, since this court is committed to the doctrine that mere acquiescence, irrespective of the length thereof, cannot legalize the clear usurpation of power which offends against the basic law. Zoning ordinances, whether they be original or amendatory legislation, and regardless of how long or by whom they have been recognized as legal, cannot be sustained if in violation of the constitution.

Trust Co. of Chicago v. Chicago 96 N.E. 2d 499, 504 (Ill. 1951) (citations omitted).

The City belatedly asserted in reply to the motion for summary judgment that the statute of limitations, Section 78-12-25(3), Utah Code, bars Tolmans' claims. This defense was not raised in the City's answer (R. 27-32), at least with

the specificity in pleading required by Rule 9(h), Utah Rules of Civil Procedure.[1] Even if limitations had been adequately pled, Tolmans should have been afforded the chance to show that the statute relied upon by the City was inapplicable, or was tolled, or that the right of action arose within the confines of the limit. Summary judgment was not appropriate.

CONCLUSION

Tolmans alleged their property was the subject of an unconstitutional reverse spot zone. Logan City's motion for summary judgment did not provide any facts that, if established, would defeat Tolmans' claims, but rather supplied evidence that supported the existence of an illegal spot-zone, and the unconstitutionality of the downzoning that occurred in the neighborhood since the original 1950 plan-ordinance. Tolmans supplied additional evidence to support their claim. The trial court erred in ruling that, as a matter of law, Tolmans could not possibly prove a case to support their complaint. The trial court's dismissal should be reversed, and the case remanded for further proceedings. In the interest of judicial economy, instructions as to Utah law on the topic of reverse spot zoning would be helpful.

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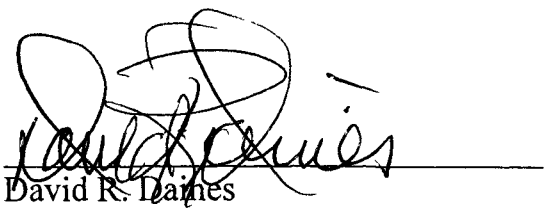
[1] "*Statute of limitations*. In pleading the statute of limitations it is not necessary to state the facts showing the defense but it may be alleged generally that the cause of action is barred by the provisions of the statute relied on, referring to or describing such statute specifically and definitely by section number, subsection designation, if any, or otherwise designating the provision relied upon sufficiently clearly to identify it. If such allegation is controverted, the party pleading the statute must establish, on the trial, the facts showing that the cause of action is so barred."

RESPECTFULLY SUBMITTED November 6, 2006.

CHRIS DAINES LAW



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CERTIFICATE OF SERVICE

On November 6, 2006, I mailed two copies of the foregoing Brief of Appellants, and two copies of the separately bound Addendum to Brief of Appellants, to each of the following:

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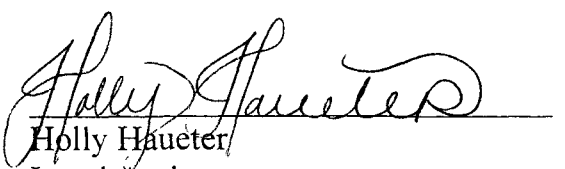

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IN THE FIRST JUDICIAL DISTRICT COURT FOR CACHE COUNTY

STATE OF UTAH

THOMAS W. TOLMAN and VERLA F. TOLMAN, Plaintiffs, v. LOGAN CITY and JOHN and JANE DOES 1-20, Defendants.	:	**MEMORANDUM IN SUPPORT OF DEFENDANT LOGAN CITY'S MOTION FOR SUMMARY JUDGMENT** Case No. 040101962 CR Judge Gordon J. Low

Defendant Logan City ("City") submits this memorandum in support of its motion for summary judgment.

INTRODUCTION

This action is a challenge to legislative land use decisions arising from a combination of the City's enactment of an ordinance in 1989 "downzoning" plaintiffs' ("Tolmans") property from multi-family zoning to single-family residential zoning and the subsequent denial in 2004 of an application for rezoning. The 1989 zoning change was enacted in response to petitions by multiple property owners with the hope of maintaining or restoring the single-family residential character of the neighborhood. Though Tolmans' property was subject to that zoning change, they did not timely challenge the rezoning. Therefore, to the extent Tolman's claims are based upon the 1989 zoning decision, those claims are barred by the applicable statute of limitations.

In the mid-1990s, the City amended its General Plan and Land Development Ordinance to reflect the policy decision to maintain the designation of single family residential use in this area of the City. Pursuant to statute, the Land Development Ordinance mandates compliance with the policies and provisions of the General Plan in any land use decisions. Tolmans' application for rezoning was not consistent with the General Plan.

The real nature of Tolmans' claims is a narrow statutory review under Utah Code Ann. § 10-9-1001. Under governing Utah law, the City's denial of the rezoning request, based on its noncompliance with the General Plan, is not arbitrary, capricious or illegal. Tolmans' other claims are similarly unsupported by fact or law and therefore fail, entitling the City to summary judgment on those claims as well as on the § 10-9-1001 review.

STATEMENT OF FACTS

1. Tolmans' property is a single-family home which was situated in a multi-family zone when they purchased it in 1983. (Second Amended Complaint ¶ 5.)

2. On August 10, 1989, the Logan City Planning Commission received petitions signed by sixty property owners requesting a downzoning of their properties from R3 to R2. (Planning Commission Minutes, August 10, 1989, relevant portions enclosed as Exhibit A.)

3. The petitioners were concerned with preservation of the single-family residential nature of their properties, privacy issues, decreasing single-family residential property values, effects of increased density and absentee landlords. (Exhibit A.)

4. The Planning Commission voted unanimously to review the rezoning proposed by the petitioners. (Exhibit A.)

5. At its September 14, 1989 meeting, the Planning Commission considered the rezoning proposal and voted unanimously to recommend the rezone to the Municipal Council. (Planning Commission Minutes, September 14, 1989, relevant portions enclosed as Exhibit B.)

6. At the same meeting another petition was presented by additional homeowners requesting that the downzoning be expanded to include their properties. (Exhibit B.)

7. On October 19, 1989, the Municipal Council held a public hearing on the property owners' rezoning proposal "About forty citizens were present who favored the proposal." Three individuals opposed the rezoning. The Council voted unanimously to

rezone the properties from R3 to R2. (Logan Municipal Council minutes, October 19, 1989, relevant portions enclosed as Exhibit C.)

8. The ordinance rezoning the properties was approved by the mayor on November 2, 1989. (Ordinance 89-52, copy enclosed as Exhibit D.)

9. Tolmans did not challenge the zoning amendment, though it affected their property as well as that of others.

10. After two years of study, the Municipal Council adopted a revised General Plan for the City of Logan on June 16, 1995. (Council findings in Ordinance No. 96-20, copy enclosed as Exhibit E.)

11. Consistent with the General Plan, the Council adopted a zoning map and Land Development Ordinance on March 6, 1996. (Exhibit E.)

12. The General Plan recognizes the tension between single family residential and multi-family uses within neighborhoods and the City's efforts to balance the interests involved.

> Logan is a City of neighborhoods. Prior to preparing the General Plan, the City Council and Planning Commission were facing requests from each of the City's residential neighborhoods to decrease the permitted density for new residential development. The actions sought, called *downzoning* requests, were intended to stop the proliferation of *fourplex* residential development in what were basically established single family neighborhoods.
>
> Zoning is an ongoing process intended to recognize changes in community values and development needs. The City invested extensive time and emotional energy into consideration of zone changes in each neighborhood. The General Plan calls for new zoning districts, which requires an area-by-area evaluation of the City to determine which new zoning district is applied to what area. The issues and concerns that generated the reductions in densities during the early 1990s had not changed at the time the General Plan was

> proposed for adoption in 1995. These values and concerns are still a part of the evaluation process for zone changes.
>
> . . .
>
> The greatest challenge in the General Plan is to balance the need for housing with desire to maintain neighborhood character.

(Logan City General Plan, portions enclosed as Exhibit F.)

13. Under the new ordinance, Tolmans' property and those others which had been zoned R2 were now designated as SFR (single family residential). (Exhibit E.)

14. Tolmans applied to the City for rezoning of their property and others, a total of 32 properties over approximately 8 acres on June 24, 2004. (Copy of application enclosed as Exhibit G.)

15. At the time of Tolman's application for rezone, the City was conducting studies for preparation of a new General Plan.

16. Pursuant to Utah Code Ann. § 10-9-303(6)(b), the City's Land Development Code mandates consistency of land development with the provisions of the General Plan. (Land Development Code § 17.01.040.)

17. The Code also recognizes that the General Plan consists of policy decisions of the City.

> The General Plan is the adopted policies of the Municipal Council. The general Plan represents a lengthy public participation process and incorporates long range goals, identified policies and an implementation program. The content of the General Plan may be cited as a basis for making decisions or as part of the finding to support actions initiated by this Land Development Code. The General Plan is adopted as part of this code by reference. The General Plan provides the policies that enable the specific regulations

> of the Land Development Code to be carried out. Implementation measures in the General Plan provide direction for specific measures within the Land Development Code. When there is a conflict between the General Plan and the Land Development Code, if the General Plan provides precise development standards, the General Plan is to be used. If the General Plan provides policy language and no specific development standards, the Land Development Code's specific measures are to prevail.

(Land Development Code § 17.01.040.E.)

18. The City's planning staff prepared an evaluation of the Tolman application on July 14, 2004. The staff recognized that multi-family use is likely the best use in the area and that preliminary results of the general plan revision process would probably support the rezoning. (Staff Report, July 14, 2004, copy enclosed as Exhibit H.)

19. The staff believed the rezone request was premature, implying that it might be better under the revised general plan. (*Id.*)

20. The staff also recognized the requirement that rezoning be consistent with the general plan and that this rezoning might constitute illegal spot zoning. (*Id.*)

21. The staff recommended denial of the request because it was incompatible with the express provision of the General Plan objective to "restore the single family scale, character, and stability to the area." (*Id.*)

22. Tolmans' rezoning request was heard by the Planning Commission on July 22, 2004. The Commission voted unanimously, with one abstention, to recommend to the Council denial of the rezoning application. (Planning Commission Minutes, July 22, 2004, relevant portions enclosed as Exhibit I.)

23. The Municipal Council took up the rezone application on August 3, 2004. The minutes indicate the basis for the recommended denial.

> The staff recommendation to deny the rezone was made because of the belief that Mr. Tolman's request was contrary to the current General Plan and 1996 citywide rezone. The Planning Commission also recommended denial, finding that the request was incompatible with the current General Plan and not supported by other planning documents, including the 1996 rezone.

The Council set a public hearing on the request for August 24, 2004. (Municipal Council Minutes, August 3, 2004, relevant portions enclosed as Exhibit J.)

24. At the public hearing, a majority of individuals opposed the rezoning. After discussion, the Council voted unanimously to deny the rezoning request based on the staff and commission recommendations. (Municipal Council Minutes, August 24, 2004, relevant portions enclosed as Exhibit K.)

ARGUMENT

I. THE CITY'S DENIAL OF TOLMAN'S REZONING APPLICATION WAS NOT ARBITRARY, CAPRICIOUS OR ILLEGAL.

Tolman's claim that the denial of their rezoning request was arbitrary and capricious. Though they do not recognize it in their complaint, this is actually a petition for statutory review of the City's decision under Utah Code Ann. § 10-9-1001 which prescribes a very narrow judicial review of the City's decision.

> The courts shall:
> (a) presume that land use decisions and regulations are valid; and
> (b) determine only whether or not the decision is arbitrary, capricious or illegal.

Utah Code Ann. § 10-9-1001(3).[1]

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[1] This section was renumbered 10-9a-801 by Senate Bill 60 adopted by the 2005 Utah Legislature, but the standard remains the same.

The City's decision to deny Tolmans' request for rezoning was a legislative one. Bradley v. Payson City Corp., 2003 UT 16, ¶ 11, 70 P.3d 47, 51. While municipal land use decisions are afforded a "great deal" of judicial deference, legislative zoning decisions "are entitled to particular deference." *Id.* ¶¶ 10, 12 at 50-51. The standard for determining whether a legislative land use decision is arbitrary or capricious is the "highly deferential" determination of whether it is reasonably debatable that the decision could promote the general welfare. *Id.* ¶ 14 at 51-52.

In Bradley, a landowner appealed from the city's denial of his request to rezone property from low density residential-agricultural to high density multi-family residential. The Supreme Court discussed the extensive history of its treatment of municipal land use decisions, noting that it had previously held that "it is 'the court's duty to resolve all doubts in favor' of the municipality, and the burden is on the plaintiff challenging a municipal land use decision to show that the municipal action was clearly beyond the city's power." Bradley ¶ 12 at 51 (citation omitted). The court then discussed the application of the reasonably debatable standard.

> In general, because a zoning classification reflects a legislative policy decision, we will not interfere with that decision except in the most extreme cases. The guiding principle behind our interpretation of legislative zoning decisions is that we will not substitute our judgment for that of the municipality. Though a municipality may have a myriad of competing choices before it, the selection of one method of solving the problem in preference to another is entirely within the discretion of the city; and does not, in and of itself evidence an abuse of discretion. The propriety of the zoning decision need only be reasonably debatable.

Bradley ¶ 24 at 54 (punctuation, citations omitted).

Of significance to the issue before this court, the Bradley court recognized the appropriateness of a legislative decision relying on the city's general plan.

> Payson City's reliance on the General Plan as a basis for its decision is precisely the kind of legislative decision that should be left to the city council and undisturbed by the judiciary. It is not up to the court to determine whether Payson City made the right decision or the best decision in relying on the General Plan . . . We evaluate only whether it was reasonably debatable that the decision reached would promote the general welfare. Payson City's reliance on the long-term policy preferences embodied in the General Plan satisfies the reasonably debatable standard.

Bradley ¶ 26 at 55 (emphasis added).

As in Bradley, the issue before this Court is not whether approval of Tolmans' rezoning request would have been a better decision. Nor is the issue whether, ultimately, multi-family zoning may turn out to be a better long-term policy choice for these properties. The simple issue is whether the City's denial based upon lack of compliance with its General Plan passes the arbitrary and capricious challenge. The Bradley court has already held that it does.

Moreover, Logan City's General Plan is not merely advisory. The Land Development Code mandates that any zoning amendments be consistent with the General Plan. In turn, the General Plan reflects the carefully weighed policy decision to support attempts to maintain or restore the single-family nature of the SFR zones.

Admittedly, it is possible that the revised General Plan may reach a different policy decision more favorable to the Tolmans' request. However, the weighing of policy issues in the revision of the General Plan had not been completed at the time of the application and could not legally be considered the legislative policy decision of the City. That

legislative policy was defined by the 1995 General Plan and Tolmans did not apply for an amendment to that General Plan. The Council was required by ordinance to follow the long-term policy decision reflected in the General Plan. Its action in doing so cannot be arbitrary or capricious.[2] The City is therefore entitled as a matter of law to summary judgment.

II. TOLMANS' INVERSE CONDEMNATION CLAIMS FAIL AS A MATTER OF LAW.

Tolmans claim that the 1989 decision to downzone their property and the 2004 denial of their rezoning application constitute inverse condemnation under Article I, section 22. In doing so, they make two inconsistent allegations: (1) the decisions denied them "all economically viable use of their property," (Second Amended Complaint, ¶ 19), and (2) took from them "a major portion of the reasonably expected return on their 1983 investment in their home property." (*Id.* ¶¶ 7, 8.) The first claim is unsupported by any evidence and the second provides no support for an inverse condemnation claim.

The threshold weakness in Tolmans' takings claim, however, is that the claim, to the extent it is based upon the 1989 downzoning, is time-barred. There is no specified limitation for the bringing of an Article I, section 22 takings claim, therefore, under Utah statute, litigation must be commenced, at the latest, within four years. Utah Code Ann. § 72-12-25(3).[3]

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[2] Tolmans have identified nothing done by the City which constitutes a violation of statutes or its ordinances and could be determined to be illegal in a § 10-9-1001 review. The decision to deny the rezoning is therefore not arbitrary, capricious or illegal.

[3] It is likely that the two-year limitation in Utah Code Ann. § 78-12-28(4) applies to this claim. In any event, a takings claim based upon a zoning decision made fourteen

Moreover, Tolmans' takings claims lack legal support. The threshold inquiry in a takings action is whether the plaintiff has a protectable property interest. Intermountain Sports, Inc. v. Dept. of Transportation, 2004 UT App 405, ¶ 8, 103 P.3d 716, 718-19. Tolmans have no such interest.

"It is established that an owner of property holds it subject to zoning ordinances enacted pursuant to a [city's] police power." Western Land Equities, Inc. v. City of Logan, 617 P.2d 388, 390 (Utah 1980). *See also* Scherbel v. Salt Lake City Corp., 758 P.2d 897, 901 (Utah 1988) (owner acquires protected property interest or vested right in current zoning only upon application for development consistent with the existing zoning); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027, 112 S.Ct. 2886, 2899, 120 L.Ed.2d 798 (1992) (noting that property owners should expect uses of property to be restricted by legitimate use of police powers and that some rights must yield to the police power). Utah courts have rejected unilateral expectations as a basis for a protected property interest. *E.g.,* Bagford v. Ephraim City, 904 P.2d 1095, 1099 (Utah 1995) (in which court looked to federal law and other state law to identify scope of protected property interest). *See also* Patterson v. American Fork City, 2003 UT 7, ¶ 23, 67 P.3d 466 (citing federal law holding that unilateral expectation is insufficient to create a constitutionally protected property right). Tolmans have, at best, a unilateral expectation that their property be rezoned for multi-family use.

The general rule is that, while the use and ownership of property are fundamental rights, a property owner has no vested, protected property right in a contemplated

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years prior to the commencement of this action is time-barred.

development or entitlement to a particular zoning designation.[4] State courts which have examined the issue have consistently held that a property owner has no protected property right in any particular zoning of property, including the existing zoning absent an application for development under that zoning, which would support state constitutional takings or due process claims.[5]

The Utah Supreme Court has recognized that routine regulation which has an impact on property value does not necessarily require compensation under Article I, section 22.

> Many statutes and ordinances regulate what a property owner can do with and on the owner's property. Those regulations may have a significant impact on the utility or value of the property, yet they generally do not require compensation under article I, section 22. Only when the governmental action rises to the level of a taking or damage under article I, section 22 is the State required to pay compensation.

Colman v. Utah State Land Bd., 795 P.2d 622, 627 (Utah 1990).

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[4] Marshall v. Bd. of County Commr's, 912 F.Supp 1456, 1464 (D. Wyo 1996); Jacobs, Visconsi & Jacobs Co. v. City of Lawrence, 715 F.Supp. 1000, 1004-05 (D. Kan. 1989); MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348-351, 106 S.Ct. 2561, 2566-2567, 91 L.Ed.2d 285 (1986).

[5] Weatherford v. City of San Marcos, 157 S.W.3d 473, 483 (Tex.App. 2004) (property owner has no "vested right in any particular zoning classification"); City of Suffolk ex rel. Herbert v. Bd. of Zoning Appeals for City of Suffolk, 580 S.E.2d 796, 798 (Va. 2003) ("Privately held land is subject to applicable local zoning ordinances whether enacted before or after the property was acquired. Generally, landowners have no property right in anticipated uses of their land since they have no vested property right in the continuation of the land's existing zoning status."); Glennon Heights, Inc. v. Central Bank & Trust, 658 P.2d 872, 877 (Colo. 1983) (en banc) (property owners' interest in their property "does not amount to a vested right in the maintenance of a particular zoning classification")

To state a claim for relief for an alleged taking arising from application of zoning ordinances, a plaintiff must allege and prove that he has been deprived of all reasonable uses of his land.

> [F]or there to be a taking under a zoning ordinance, the landowner must show that he has been deprived of all reasonable uses of his land. For example, almost all zoning decisions have some economic impact on property values. However, mere diminution in property value is insufficient to meet the burden of demonstrating a taking by regulation.

Cornish Town v. Koller, 817 P.2d 305, 311-12 (Utah 1991) (emphasis added). In other words, a regulatory taking only occurs when there is no remaining economically viable use for the property.

> The state has broad authority to regulate or prevent certain uses of land under its police power; it need compensate a landowner only if the regulation deprives him or her of all economically viable use of the land, *i.e.,* when it effects a "regulatory taking."

National Parks and Conservation Ass'n v. Bd. of State Lands, 869 P.2d 909, 925 (Utah 1993) (emphasis added).

The term "economically viable use" does not equate to highest and best use. For example, in Smith Investment Co. v. Sandy City, 958 P.2d 245 (Utah App. 1998), the Court of Appeals, applying federal law which similarly requires deprivation of all economically viable use, concluded that a substantial reduction in value (43% reduction) did not deprive a property of economically viable use so long as some reasonable value remained and the reduction did not support a takings claim.

Tolmans' takings claims fail on two counts. They possess no property interest entitled to Article I, section 22 protection. They also are unable to produce any evidence

that they have no remaining economically viable use of their property. In reality, the fact that they own property within the City, located in a residential zone, strongly implies that there is some value to the property for the purposes for which it is zoned. There is no evidence that the denial of the rezoning even diminished the value of the property. Any claim of reduced value based upon the 1989 downzoning is time-barred.

III. TOLMANS' ARTICLE I, SECTION 7 DUE PROCESS CLAIMS ARE FACTUALLY AND LEGALLY UNSUPPORTED.

Tolmans allege due process violations under Article I, section 7. They do not bother to identify whether these are procedural or substantive due process claims. There is nothing in their Second Amended Complaint which would support a procedural due process claim and, in fact, the record establishes that they were afforded procedural due process.[6]

The first step in a due process analysis is, as in the takings analysis, the identification of a constitutionally protected property interest. State in Interest of Summers v. Wulffenstein, 616 P.2d 608, 610 (Utah 1980). As discussed above, Tolmans have no such interest. *See* City of Livonia v. Dept. of Social Services, 333 N.W.2d 151, 160-61 (Mich.App. 1983) ("the mere fact that the individual plaintiffs may have relied upon the continuance of existing zoning does not give them a property interest entitling them to due process protection."); W.C.& A.N. Miller Development Co. v. Dist. of Columbia Zoning Comm'n, 340 A.2d 420, 424 (D.C. 1975) ("while property rights may

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[6]Any due process claims based upon the 1989 downzoning are also time-barred because they were not brought within two years. Utah Code Ann. § 78-12-28(4). To the extent that § 78-12-28 may be deemed prospective only, then the extant catchall four-year provision in § 78-12-25(3) applies.

not be taken away without due process of law, a property owner has no right to a particular zoning classification of his property.") Absent a legally cognizable property interest, Tolmans' due process claims fail as a matter of law.

Moreover, in a substantive due process challenge, a zoning ordinance will be upheld under the reasonably debatable standard applicable to the arbitrary and capricious analysis discussed above.

> In reviewing [a] substantive due process challenge, we focus not on the ordinance's alleged or potential effects, but on the ordinance itself and the reasons given by [the] City for its enactment.
>
> . . .
>
> If the ordinance and the stated policies and reasons underlying it do, within reason, debatably promote the legitimate goals of increased public health, safety or general welfare, we must allow [the] City's legislative judgment to control.

Smith Investment at 253. It is well-established that courts do not substitute their judgment for that of the city's legislative body. *Id.* at 253.

As discussed in Point I above, the record provides more than adequate evidence that it is at least reasonably debatable whether the City's zoning decision is reasonable. In fact, the Supreme Court in Bradley has concluded that legislative reliance on the General Plan as a basis for denying a rezoning is reasonably debatable and not arbitrary or capricious. There is, therefore, no basis for Tolmans' substantive due process claims.

CONCLUSION

The undisputed facts which are material to the City's motion are contained in the legislative record. Logan City's denial of Tolmans' request for rezoning was not arbitrary, capricious or illegal under governing Utah law. Their claims of inverse condemnation and

deprivation of due process similarly fail for lack of factual or legal support. The City is therefore entitled to summary judgment in its favor on all of the claims asserted in the plaintiff's Second Amended Complaint, as a matter of law.

DATED this 21st day of June, 2005.

WILLIAMS & HUNT

By _____
Jody K Burnett
Attorneys for Defendant Logan City

121783.1

Tab 2

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IN THE FIRST DISTRICT COURT, CACHE COUNTY, STATE OF UTAH

THOMAS W. TOLMAN and VERLA F. TOLMAN, Plaintiffs,	**AFFIDAVIT OF THOMAS W. TOLMAN**
vs.	Case No. 040101962 CR
LOGAN CITY and JOHN and JANE DOES 1-20 Defendants.	Judge Gordon J. Low

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STATE OF UTAH)
) ss.
COUNTY OF CACHE)

I, Thomas W. Tolman, being first duly sworn on oath depose and say:

1. I am one of the Plaintiffs in the above entitled action. I have read the Second Amended Complaint filed herein in my behalf dated April 18, 2005 consisting of seventeen paragraphs, and a prayer for relief on seven total pages. I hereby verify that I have read and studied the same, and that the contents of the Second Amended Complaint are true and correct to the best of my knowledge, information and belief, and, as to matters stated on belief, I believe them to be true. I hereby incorporate the Second Amended Complaint herein by this reference.

2. Neither me nor my wife have ever taken any action in reliance on the Logan City re-zoning ordinances of 1989 or 1996, which down-zoned the property on which our subject home is located, from multiple family dwelling to a single family dwelling zone. When we purchased the home in 1983 we relied on the Zoning Ordinance 1950 then in effect, which established the multi-family zoning and the predominant multi-family uses in the zone that assured us that we would be able to sell the home for a reasonable price surrounded by multiple dwellings.

3. Our sole purpose in applying for the rezone was to change the zoning of our home and lot to conform to multi-family zone in accord with the surrounding uses so we could sell it for a reasonable price, or at least convert it into a feasible investment property. We were diverted from applying for our single lot rezone to include about thirty other surrounding lots pursuant to the advice and direction of officials of the Logan City Department of Community Development under the following circumstances. That diversion was very costly in time and work. It required the promotion of a petition signed by the other owners in the re-zone area and other neighboring owners (See Exhibit A) . It also required extensive surveying of the actual multi-dwelling versus single family uses in an extended area (See Exhibit B). This work and delay would not have been necessary or useful in obtaining a re-zone of our lot if the City had accepted our application for our single lot rezone because it is totally surrounded by multiple dwelling uses.

4. About three months before filing our application on June 24th 2004, I went to the Logan City Department of Community Development to explore the possibility of getting the zoning of our former family home changed to multiple dwelling to conform to the surrounding multi-family uses and former zoning so that it would be saleable and rentable at a reasonable price approaching market value. The fact that it had not been so saleable (or rentable) at near

market value had resulted in a family financial crisis that was so severe that we had no funds with which to pay for legal advice on whether to file for our single lot re-zone or include multiple surrounding lots. Therefore, I relied on the advice and direction given by the officials of the City's Department of Community Development.

5. On my first visit to the office in about March 2004, I was referred to City Planner, Michelle Mechem, After explaining the problem to her she told me that single lot re-zone applications had rarely been approved and that my best chance from past history was to include a large area with multiple adjacent lots and supporting signatures on the petition of the owners in and surrounding the area of the proposed re-zone. I relied on the City's advice and direction, did not file for a single lot re-zone, promoted the area re-zone by petition signed by all owners within the area included in our re-zone application and other owners in the area (Exhibits A and B). In addition, I made extensive surveys to establish which lots in the area were in fact, either multi-family uses or single family uses, and the number of units in each structure, in order to establish the details of the well known multiple dwelling use characteristic that is and has been the predominant characteristic of the neighborhood since and before the first ordinance of 1950 (see Exhibit C and City Exhibit H pg. 2). Then on June 24th 2004, in accord with the advice and direction of the City, I filed the multiple lot re-zone application, rather than for our lot alone. The timing of this application was specifically because the City Planners office had said that they were submitting their new proposed master zoning plan and by submitting at this time I would be following them through the system.

6. Beginning about May 2004 and continuing, I have made a survey and investigation of the existing uses of dwellings on lots, including the number of dwellings in the buildings on those lots, and the dwellings units per acre in a broad seventeen block area surrounding my lot and largely in the same existing zone. The elements that I have considered in arriving at the conclusions included; interviews with owners, tenants and neighbors; the number of postal mail boxes; the number of apparent dwelling unit entry doors; power and gas meters; and, fifty-two years of experience living and visiting in the neighborhood, as well as other factors.

7. The results of my investigation-survey as regards the uses of lots on the four blocks centered one lot west of my lot at the intersection of Fourth North and Fifth East streets are illustrated and summarized on Exhibit B attached hereto consisting of five pages. The last four pages are recent plats of those four Blocks from the Cache County recorders office which have been marked to show the lot by lot results of my survey. Our home and lot at 425 East Fourth North, fronts on a four lane highway and principal traffic artery designated on the plats as "Fourth North Street". It has turning lanes with parallel parking on both sides and a speed limit of 40 miles per hour It is one of the principal traffic arteries in the, the valley and points east. It is also US Highway 89, and designated by Logan City as "University Boulevard". It is also the main arterial highway connecting downtown Logan, five blocks to the west to Utah State University, two blocks East of our home. It has always been the main entry to and through the University campus. The eastern extension of US 89 beyond campus is the highway through Logan Canyon and continues on to Yellowstone Park. It connects with other highways going to points easterly from Cache Valley. The block East of our Block 14 boarders on the west of the Campus and has

always been zoned for multiple dwelling housing. The four blocks included in Exhibit B have always been the prime location for University student, staff, and personnel housing in predominantly multi-dwelling housing as described in Exhibit B and City Exhibit H.

8. I am 54 years old and have an associates degree in electronics from the Utah Technical College. I was raised in my family home at 393 East 4th North Street until 1970. For 13 years thereafter I was in the Military, school and work, living away from Logan but frequently visiting my family and friends who lived in this neighborhood. My ancestors have lived in this neighborhood since about 1916. I moved back into the neighborhood in a rented home for one year and purchased the subject home in 1983 where we lived and raised our nine children. After most of our children were gone from home we purchased and moved into another home in the same general area, more suitable to our needs. I thus have intimate knowledge of this neighborhood.

9. The summary and conclusions of this survey illustrated in Exhibit B are as follows:

a. **Our Re-zone parts of Blk. !4 pg. 2 & Blk. 11 pg. 3 outlined in Blue:** The area in our re-zone application included 31 lots split between Blocks 14 and 11. There are 6-24% of owners, including us, who have single dwelling units on their lots and 25-74% have multi family dwellings. The parcels owned by those 6 single family owners, including us, are totally isolated and surrounded by the multiple dwelling uses. Those owners, and all of the owners of lots in our re-zone area (and neighboring owners) signed our re-zone petition (Exhibit A). In terms of dwelling unit numbers rather than structures, there are 71 dwelling units; 63- 89% are in multiple dwelling structures and 8-11% in single family structures. By the City's density-zone measure, this would

be in a Multi Family High zone. (See "f" infra).

b. **Our whole Blk 14 pg. 3:** The survey results in our full Block 14 are as follows: There are 40 structures in the Block; 25 -63% are multiple dwellings and 15-37% are single family dwellings. Of those 15 single dwellings, 6 including ours are totally surrounded by multiple dwelling units, and, 6 other lots in 3 groups of 2 are totally surrounded by multi-dwelling units. From the view of dwelling unit numbers, rather than structures, there are 80 dwelling units with 16-20% in single family and 64-80% in multi-family units. By the City's density-zone measure this should be a Multi Family Medium zone. (See "f" infra).

c. **Whole Blk 11 pg. 3.** The "character of the neighborhood" results in Block Eleven are as follows: There are 30 structures in the Block; 21-77% are multi-dwelling units and 9-23% are single dwelling units. The 9 single-dwelling lots are each surrounded by multi-dwelling lots by counting the three adjacent lots owned by the one petitioner (Hansen/Oliver). Otherwise, 8 of the 9 single family lots are totally surrounded by multiple family lots. From the view of dwelling unit numbers rather than structures, there are 80 dwelling units with 16 - 20% in single family, and, 74 - 80 % in multi-family units. By the City's density-zone measure this should be a Multi Family High zone. (See "f." infra).

d. **Whole Blk 10 pg. 4.** The "character of the neighborhood" results in Block Ten are as follows: There are 33 structures in the Block; 18 - 55% are multi-dwelling units and 15- 45% are single family. From the view of the 88 dwelling unit numbers, versus structures, 73-80% are in multi dwelling structures and 15-20% in single family structures. By the City's density-zone measure this should be a Multi Family Medium Zone. (See "f" infra)

e. **Whole Blk 15 pg. 5.** The "character of the neighborhood" results in Block 15 are as follows: There are 39 structures in the Block; 25-64% are multi-dwelling structures and 14-36% are single dwelling structures. From the view of dwelling unit numbers rather than structures, there are 102 dwelling units with 14-14% in single family dwellings, and single family units and 88- 86% in multi-family units. By the City's density-zone measure that should be a Multi Family High zone. (See "f' infra).

f. **City dwelling units per acre zoning standard application:** For City planning purposes they use a measure of units per acre as the designator for the respective zone. i.e. Single Family Residential (SFR) is described as 7 or less units per acre. Likewise, Multi-Family Medium (MFM) is 11 or less units per acre; MF High is 14 or less units per acre; MF Very High is 32 or less units per acre. All four of the blocks are currently zoned SFR. If we look at the statistics from the block survey we find the following results:

Block 10 = 9.1 units per acre or what should be a MFM ("Multi Family Medium") zone

Block 11 = 11.28 units per acre or what should be a MFH ("Multi Family High") zone

Block 14 = 10 units per acre or what should be a MFM zone.

Block 15 = 12.75 units per acre or what should be a MFH zone.

Rezone Parts of Blocks 11 and 14 = 12.75 units per acre or a MFH zone.

10. The following survey data in the Block East of Block 11, extending from 6th to 7th East (Campus) and south of Fourth North, is included only to refute the City's claim to the effect that 60 property owners in the rezone area petitioned for "downzoning of their properties" in the first downzone application process of 1989. (See Plaintiff's Memo Opposing Motion, **I FACTS**

Response to 2). In that Block there are 14 total lots-structures of which 7 are multiple family dwellings and 7 are single family dwellings.

11. As the owner of my home and lot and the additional qualifying factors hereafter stated, I have an opinion that the fair market value of the home and lot: (A) Subject to the present downzone restriction of use as single family residence, surrounded by actual multi-family residences in a predominantly multi-family general neighborhood; (1) We have attempted to sell on our own without listing (general sale attempt history). (2) The only offers received were early on and well below appraised value of $130,000 before we discovered we couldn't sell it as a single family home because of the overwhelming multi-family nature of the neighborhood. (3) Commentary such as 'it is zoned wrong to pay full value, if it were zoned multiple I would make a better offer' types of statements. (4) The mortgage at the time of those offers, summer of 2002, was about $115,000, one offer was for about $70,000 and the other for $100,000.

12. Because of the family financial crisis created by the downzoning, wherein we have had to spend down savings and increase debt for upkeep and mortgage expense, we are without funds with which to pay real estate appraisers for court use affidavits and would be unable to pursue a court remedy except for the fact that our attorneys are serving pro bono. My opinions are in part based on the value of the conversion from a VA loan to a conventional loan at the time we traded homes, also comparable valuation estimates given by realtors I was considering listing with, and most recently an appraisal by a potential refinance company in October 2005. Lending companies look at this extra property as investment property and so don't loan as high a ratio and expect money in the bank to cover vacancy. Bank accounts are low since they are reduced to

compensate for the limited funds we can obtain in rent by only putting "three unrelated people" in a six bedroom house that housed 11 individuals when my family was living there! My opinion of market values based on the assumption of change in zoning to multi-family is based partly on my limited knowledge of sales of properties with apparent comparable elements in the general area and other factors. Real estate appraisers will not provide opinions based on future assumptions or existing conditions for court purposes in the absence of substantial fees in advance.

Signed and dated this 14 day of April, 2006.

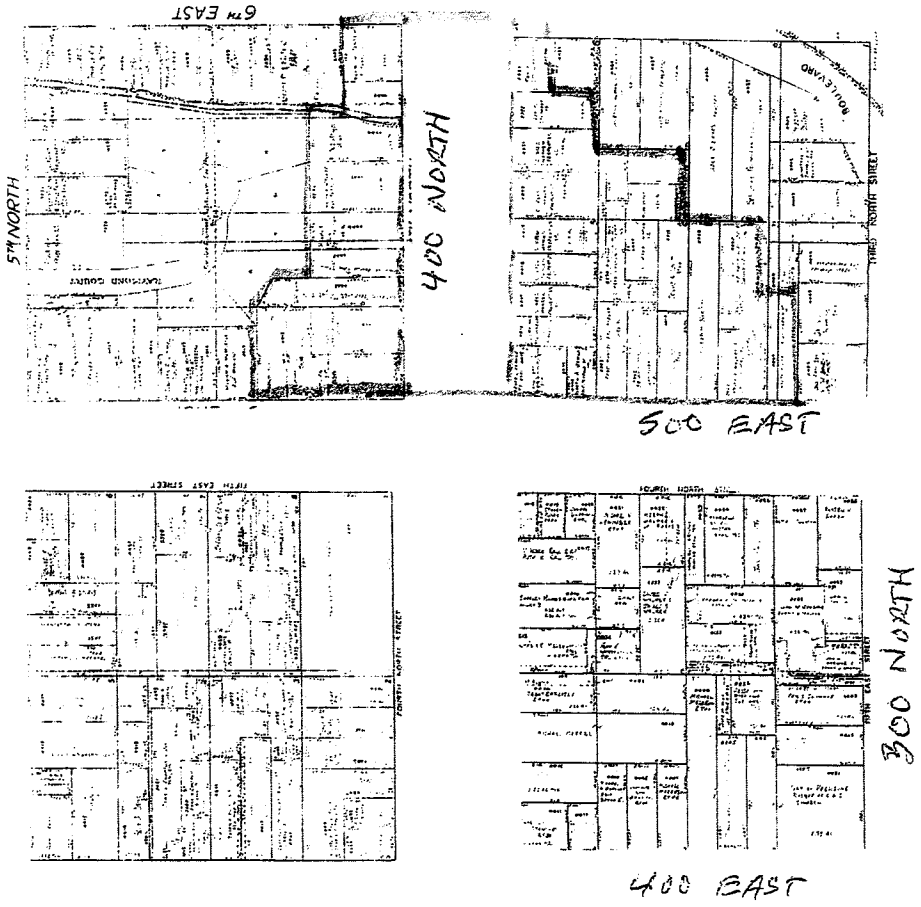
Thomas W. Tolman

Subscribed and sworn to before me, the undersigned notary public, this 14 day of April, 2005.

Notary Public

Tab 3

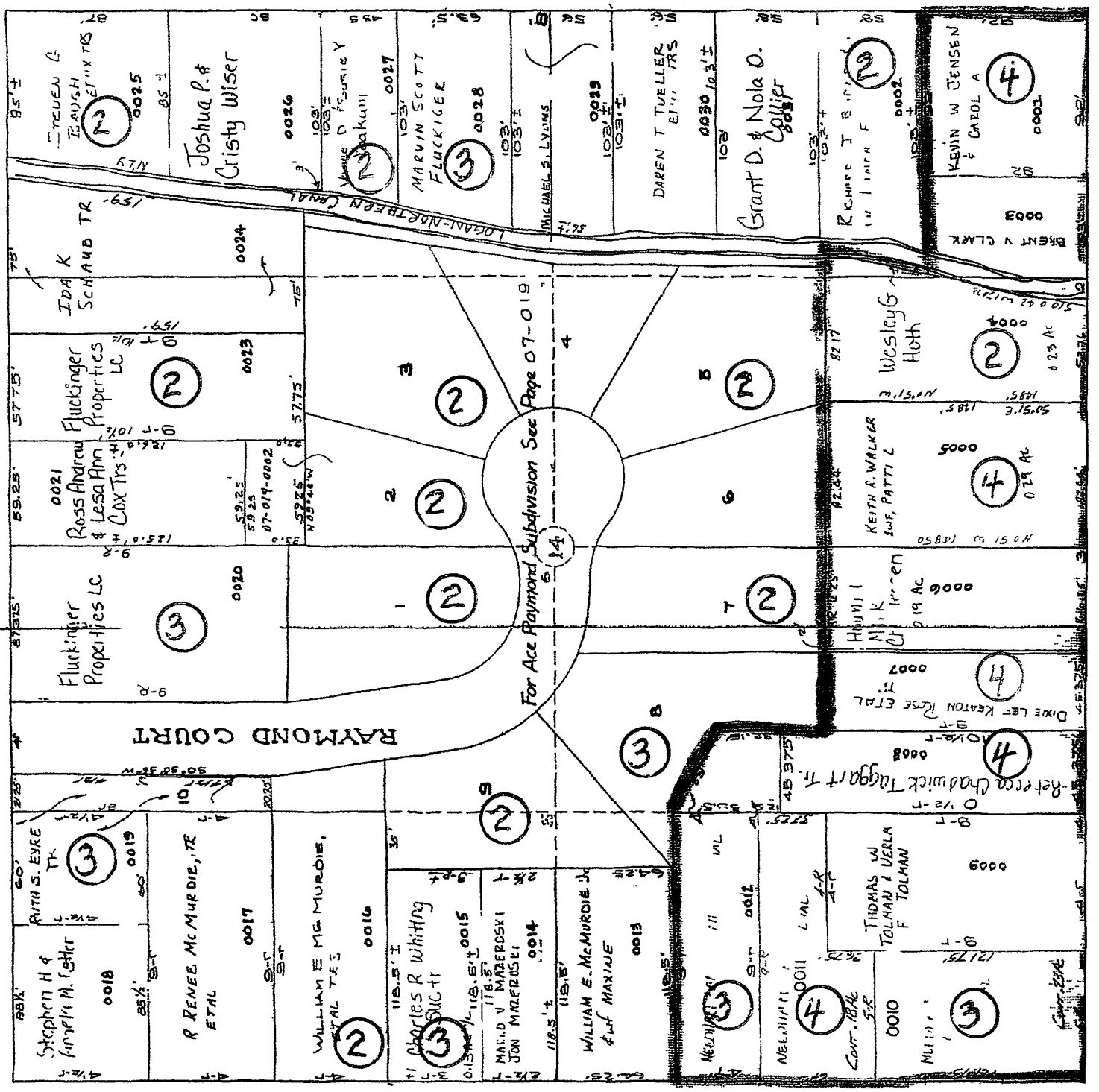
BLOCK LOCATION MAP

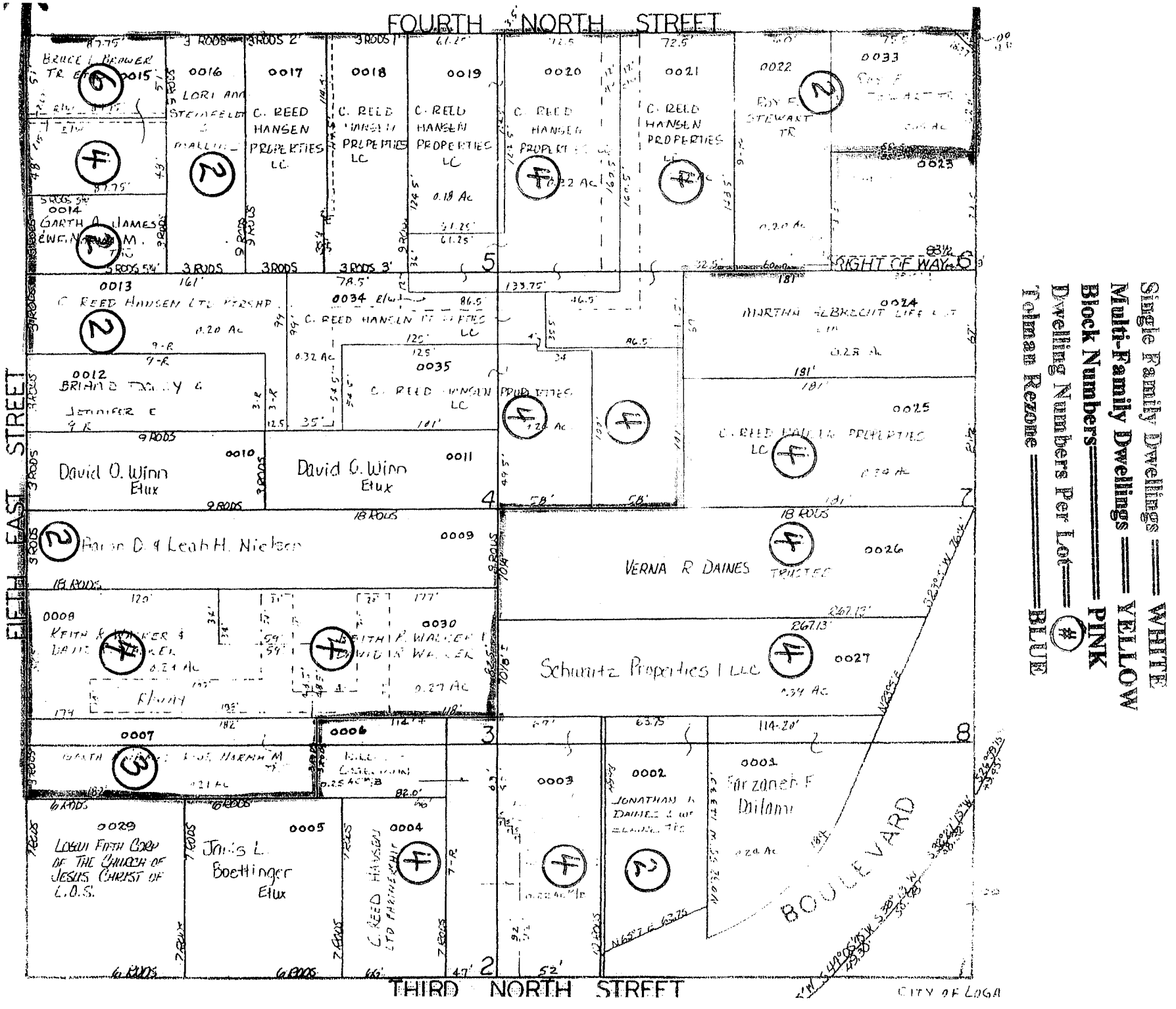


NORTH

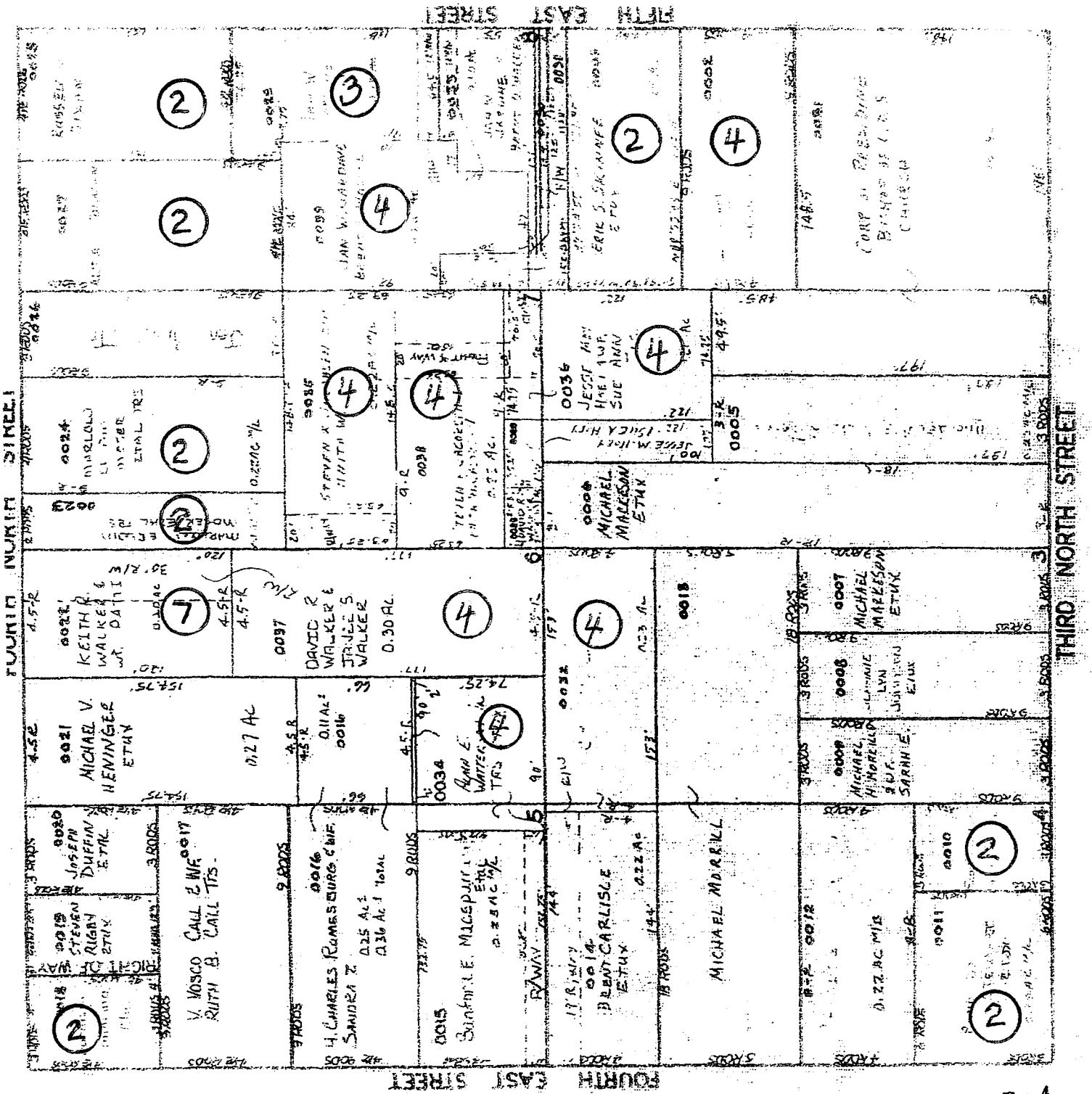
Outline of Tolman Rezone Area = Blue

Single Family Dwellings ═══ WHITE
Multi-Family Dwellings ═══ YELLOW
Block Numbers═══════ PINK
Dwelling Numbers Per Lot═══ (2)
Tolman Rezone ═══════BLUE

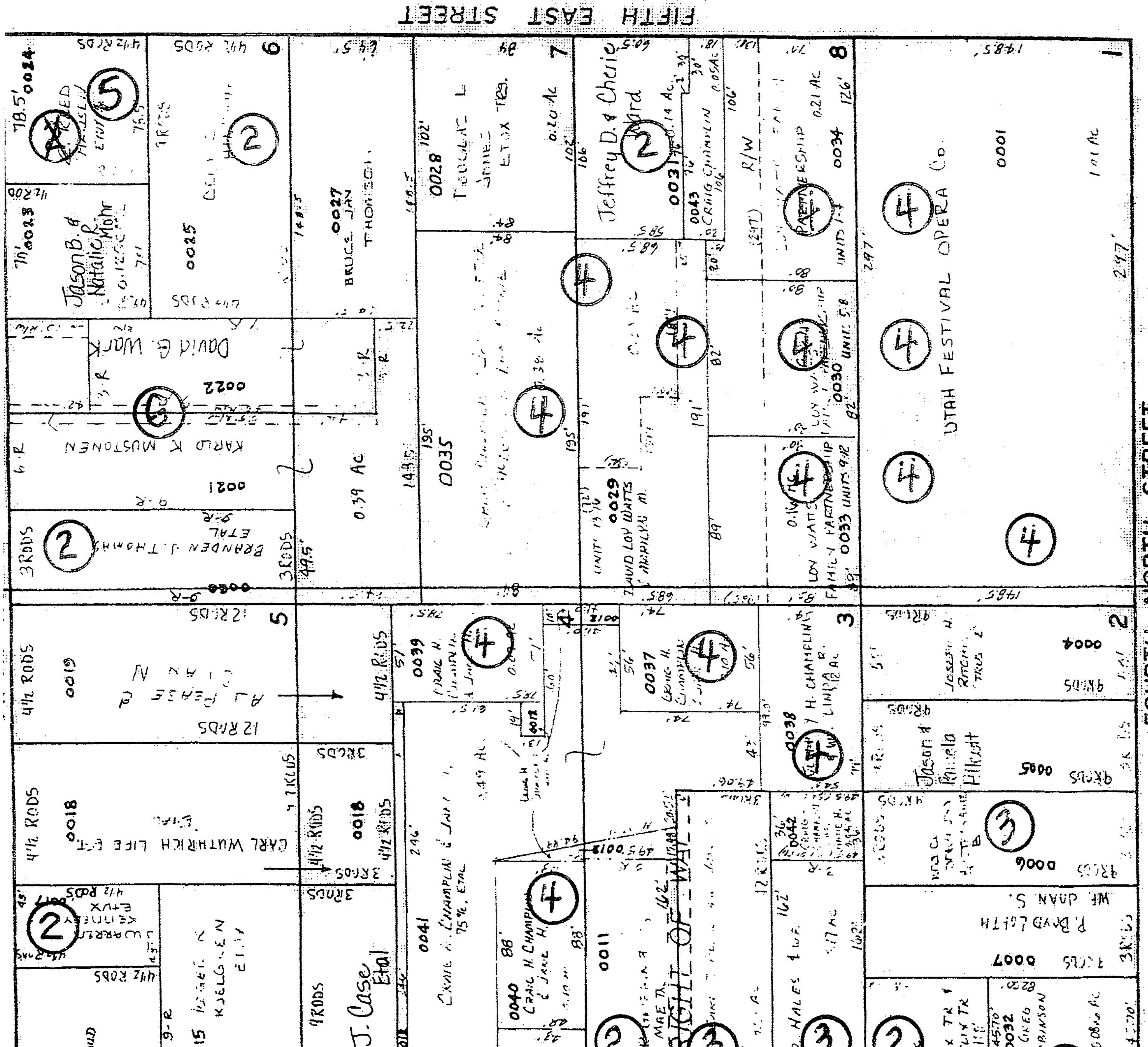



FOURTH NORTH STREET
FIFTH EAST STREET
THIRD NORTH STREET
RIGHT OF WAY
BOULEVARD
Single Family Dwellings = WHITE
Multi-Family Dwellings = YELLOW
Block Numbers = PINK
Dwelling Numbers per Lot = #
Palmer Rezone = BLUE
CITY OF LOGA

Single Family Dwellings ═══ WHITE
Multi-Family Dwellings ═══ YELLOW
Block Numbers═══════ PINK
Dwelling Numbers Per Lot═══ (#)



Single Family Dwellings ═══ WHITE
Multi-Family Dwellings ═══ YELLOW
Block Numbers═══════════ PINK
Dwelling Numbers Per Lot═══ (#)



Tab 4

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IN THE FIRST JUDICIAL DISTRICT COURT FOR CACHE COUNTY

STATE OF UTAH

THOMAS W. TOLMAN and VERLA F. TOLMAN, Plaintiffs, v. LOGAN CITY and JOHN and JANE DOES 1-20, Defendants.	:	**REPLY MEMORANDUM IN SUPPORT OF LOGAN CITY'S MOTION FOR SUMMARY JUDGMENT** Case No. 040101962 CR Judge Gordon J. Low

Defendant Logan City submits this memorandum in response to plaintiffs' opposition to its motion for summary judgment.

INTRODUCTION

Because Tolmans have missed the point of the City's motion, it is important to clarify the issues before the Court. There are three. First, plaintiffs' claims based upon

actions taken prior to the August 24, 2004, denial of their rezoning application are time-barred as a matter of law. Secondly, the City's denial of Tolmans' rezoning application was not arbitrary, capricious or illegal under governing Utah law. Thirdly, there are no disputed facts which are material to these two dispositive issues. The City is therefore entitled to summary judgment as a matter of law.

Tolmans have submitted an affidavit and opposition memorandum, both of which fail to either create an issue of fact or argue legal authority which is relevant to the City's motion for summary judgment. While Tolmans attempt to create factual disputes, they mistakenly focus on the background facts provided by the City which are material to the City's motion only to the limited extent that they relate to the running of the applicable statutes of limitation. Tolmans' sole legal argument is related to the actions for which their claims are time-barred. Their legal focus is the claim that the 1989 downzoning of their property was somehow an illegal "spot zoning." That legal argument is immaterial because the actions to which it is directed are barred by the statutes of limitation.

Tolmans have apparently conceded their inverse condemnation claim and their Article I, section 7 due process claim. They have completely failed to respond to the City's legal authorities which address those claims.

RESPONSE TO TOLMANS' TREATMENT OF THE STATEMENT OF FACTS

Tolmans' memorandum and affidavit fail to creat any disputed issues of fact which are material to the City's Motion for summary judgment. In an attempt to create issues of fact, Tolmans simply disagree with most of the City's fact statements and have submitted

the Affidavit of Thomas W. Tolman. Neither of these is sufficient to create a fact issue to avoid summary judgment.

Tolmans' responses to the City's fact statements are merely argumentative characterizations of their own view of the facts. The responses contain no "citation to relevant materials" as required by Rule 7(c)(3)(B), Utah R.Civ.P. More significantly, Tolmans' take issue primarily with the factual assertions in ¶¶ 1-11, which the City provided only for two purposes: (1) historical background to give context to the claims; and (2) to establish dates for statute of limitations purposes. It is worth noting, however, that the minutes and other City records provided are competent evidence and speak for themselves. If Tolmans wish to challenge that evidence, they must do more than make conclusory arguments about their own interpretation of the facts.

The Affidavit of Thomas W. Tolman, although also largely conclusory, asserts a different set of facts which has no relevance to the legal issues presented to the Court by the City's motion for summary judgment. Tolmans' "Additional Statement of Facts," based upon the affidavit, demonstrate the lack of materiality to the decision which is being challenged. The first fact statement is that the rezoning denial "resulted in a major diminution of the fair market value" of the property. Diminution of value is simply not material to the downzoning issue. *See* Smith Investment Co. v. Sandy City, 958 P.2d 245 (Utah App. 1998) (downzoning resulted in 43 percent diminution in market value).

The second fact demonstrates the character of the properties at issue and surrounding properties to argue that the Tolman property would be more properly zoned for higher density use. Those facts, however, are immaterial for at least two reasons

First, the City's decision was based upon the ordinance requirement that any rezoning be compatible with the City's General Plan. The General Plan did not permit the higher density zoning, and Tolmans did not apply for a General Plan amendment to do so. Secondly, under governing law, the Court is not permitted to substitute its judgment for that of local zoning officials. Even assuming for the limited purposes of this argument that it might be appropriate to zone the property in question for a higher density or intensity of use, the mere existence of an alternative choice does not make the City's decision arbitrary or capricious.

Summary judgment is often appropriate despite the existence of collateral factual disputes where the disputed facts are not material to the legal questions presented. *E.g.*, Fink v. Miller, 896 P.2d 649, 655 (Utah App. 1995) (summary judgment appropriate despite multiple disputed facts where those facts were immaterial). To constitute a fact which would preclude summary judgment, the fact must be material to the applicable rule of law. Norton v. Blackham, 669 P.2d 857, 859 (Utah 1983). The disputed facts advanced by Tolmans are immaterial to the fundamental legal issues presented to this Court by the City's motion.

Because the facts which Tolmans attempt to advance are not material to the issue before the Court, *i.e.*, whether the denial of their rezoning application was arbitrary, capricious or illegal, they cannot create issues of fact to avoid summary judgment. Under the undisputed facts established by the legislative record relating to this matter, the City is therefore entitled to summary judgment as a matter of law.

ARGUMENT

I. TOLMANS' CLAIMS BASED UPON ACTIONS TAKEN PRIOR TO AUGUST OF 2000 ARE BARRED BY THE APPLICABLE STATUTES OF LIMITATION.

Tolmans argue that their claims are not barred by estoppel or waiver. However, the issue presented by the City's motion is not an equitable one, but the legal question of whether the claims are time-barred by the running of the applicable limitations periods. Any claims Tolmans may have which are based upon the 1989 downzoning or the 1995 adoption of a new General Plan are barred by Utah law. They failed to timely challenge those decisions within 30 days as required by Utah Code Ann. § 10-9-1001(2) (1995).[1] Moreover, those claims are also barred by the four-year "catchall" limitation in Utah Code Ann. § 78-12-25(3). The facts material to the statute of limitation question are undisputed. The City is entitled to judgment as a matter of law on Tolmans' claims arising from any actions prior to August of 2000.

II. TOLMANS HAVE FAILED TO CITE ANY APPLICABLE AUTHORITYY TO AVOID SUMMARY JUDGMENT.

Tolmans' sole, conclusory argument with respect to the real issue before the Court is that "[i]n this case not only is there a genuine issue as to whether the decision was arbitrary, capricious or illegal, it was so as a matter of law." (P's memorandum p. 17.)

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[1] Though that statute did not exist in 1989, it was retroactive. Statutes are retroactively applied where they are procedural, dealing with the legal machinery which gives effect to substantive law. State ex. rel. T.M., 2003 UTApp 191, ¶ 17, 73 P.3d 959, 964. Statutes of limitation are procedural in nature and given presumptive retroactive effect. *I.e.*, State v. Skakel, 888 A.2d 985, 1021 (Conn. 2006); In re K.N.P., 179 S.W.3d 717, 720 (Tex.App. 2005).

They fail to address the governing Utah law cited by the City in its memorandum and provide no case law of their own to support such a conclusion.

On the unrelated and immaterial issue of the 1989 downzoning, Tolmans do provide, without any legal analysis, an ALR annotation on spot zoning. There are three problems with this tactic. First, Utah courts have consistently refused to perform a party's analysis where the party has failed to do so. *E.g.,* Midvale City Corp. v. Haltom, 2003 UT 26, ¶ 75, 73 P.3d 334, 349 (without analysis, court is unable to make an informed decision). Second, regardless of whether the 1989 downzoning might be considered as "spot zoning" in some other context,[2] that decision is not subject to challenge here because the applicable statute of limitation has long since run. Third, the 2004 denial of Tolmans' rezoning request was not a spot zoning.[3]

As discussed in the City's initial memorandum, under applicable Utah law, the City's denial of Tolmans' application was not arbitrary, capricious or illegal. Tolmans have provided no authority to support a different conclusion.

It is also significant that Tolmans have failed to respond to the City's legal arguments with respect to their inverse condemnation and due process claims. In essence, the City's motion on those two issues is unchallenged, entitling it to judgment on those claims.

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[2] Typically a downzoning is not treated legally as a spot zoning.

[3] The fundamental requirement to be a spot zoning is that a zoning change be effected. Here there was no change, just preservation of the status quo.

III. THE CITY'S DENIAL OF TOLMAN'S APPLICATION FOR REZONING WAS NOT ARBITRARY, CAPRICIOUS OR ILLEGAL AS A MATTER OF LAW.

As discussed in the City's initial memorandum, the General Plan was being reviewed for possible revision which may have provided for a higher density use of the Tolman property. Rather than wait for that process to be completed or apply concurrently for a General Plan amendment, Tolmans chose instead to proceed with their application for rezoning under the current General Plan and City ordinance which mandated compliance with the General Plan.[4] The City subsequently denied the application because it did not conform to the General Plan.

Well-established Utah law grants considerable discretion and a presumption of validity to legislative zoning decisions and imposes a high burden to show that those decisions are arbitrary, capricious or illegal. The governing case here, one not discussed or challenged by Tolmans, is Bradley v. Payson City, 2003 UT 16, 70 P.3d 47. In Bradley, the court held that the standard applicable to legislative zoning decisions is the "highly deferential" reasonably debatable standard for purposes of the arbitrary or capricious evaluation. *Id.* ¶ 14 at 52. Moreover, it held specifically that a City's denial of a rezoning based upon incompatibility with the City's General Plan satisfies the reasonably debatable standard. *Id.* ¶ 26 at 55.

Because Logan City denied Tolmans' rezoning application for failure to conform to the General Plan, its decision was, as a matter of law, not arbitrary or capricious. Tolmans

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[4] Tolmans state that they made application for the rezoning without the advice of counsel to avoid legal expenses. That does not excuse them from application of the zoning ordinances in effect at the time their application was made and considered.

have pointed to no breach of a statute or ordinance which would support a claim of illegality. The City is therefore entitled to summary judgment as a matter of law.

CONCLUSION

Tolmans have failed to create an issue of fact which would preclude summary judgment. The undisputed facts establish that all claims related to the 1989 and 1995 actions by the City are time-barred. The facts material to the City's denial of Tolmans' more recent 2004 rezoning application establish that the City's decision was not arbitrary, capricious or illegal. The City therefore respectfully requests that judgment be entered in its favor.

DATED this 25 day of April, 2006.

By Kymber Housley
Kymber D. Housley
Attorneys for Defendant Logan City

Tab 5

IN THE FIRST JUDICIAL DISTRICT COURT, IN AND FOR CACHE COUNTY, STATE OF UTAH

THOMAS W. TOLMAN and VERLA F. TOLMAN, Plaintiff(s), vs. LOGAN CITY and JOHN and JANE DOES 1-20, Defendant(s).	MEMORANDUM DECISION Case Number: 040101962 CR JUDGE: GORDON J. LOW

This matter is before the Court upon the Defendants' Motion for Summary Judgment, which was filed on June 22, 2005. No action was taken on the Motion for Summary Judgment until this Court noticed the matter up for dismissal due to failure to prosecute. The same was addressed on March 27, 2006, wherein counsel for the Plaintiff indicated to this Court that the response to the Motion for Summary Judgment would be timely filed.

On April 14, 2006, a memorandum was filed by the Plaintiff opposing the Motion for Summary Judgment and the same was supported by an affidavit of Thomas W. Tolman. A reply memorandum was filed by the Defendant on April 25, 2006, together with a Notice to Submit the same for decision. No request for oral arguments has been made by either party.

For reasons stated by the Defendant in it's original Memorandum, and more specifically,

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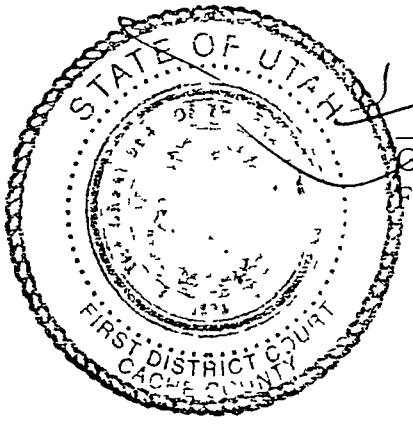
in it's Reply Memorandum, the Motion for Summary Judgment is granted.

Counsel for the Defendant is instructed to prepare a formal order in conformance herewith.

Dated this 2 day of MAY, 2006

BY THE COURT.



Gordon J. Low, District Court Judge
First District Court

GJL/ts

Memorandum Decision
Case# 040101962 CR
Tolman vs Logan City

Tab 6

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IN THE FIRST JUDICIAL DISTRICT COURT FOR CACHE COUNTY

STATE OF UTAH

THOMAS W. TOLMAN and VERLA F. TOLMAN, Plaintiffs, v. LOGAN CITY and JOHN and JANE DOES 1-20, Defendants.	:	SUMMARY JUDGMENT AND ORDER OF DISMISSAL Case No. 040101962 CR Judge Gordon J. Low

This matter came before the above-entitled Court, the Honorable Gordon J. Low presiding, for consideration of defendant Logan City's Motion for Summary Judgment. Neither party requested oral argument, and the matter was submitted to the Court for decision on the basis of the papers submitted by counsel for the parties. Having reviewed the legal memorandum and exhibits submitted by the parties, the Court issued its Memorandum Decision dated May 2, 2006, granting defendant Logan City's Motion for Summary Judgment. Pursuant to that

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Memorandum Decision and for the reasons more fully set forth herein, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. Defendant Logan City's Motion for Summary Judgment is hereby granted on the basis that there are no genuine issues of material fact for the reasons more fully set forth in the Memorandum Decision dated May 2, 2006, and the memoranda submitted in support of its motion on behalf of defendant Logan City.

2. The plaintiff's Complaint, together with all claims and causes of action set forth therein, is hereby dismissed, with prejudice and upon the merits. All parties are to bear their own respective costs and attorney's fees.

DATED this 12 day of June, 2006.

BY THE COURT

Gordon J. Low
District Court Judge